1993

State of Utah v. Gregory Morris Matison : Brief of Appellee

Utah Court of Appeals

Jan Graham; Utah Attorney General; attorney for appellee.
D. Gilbert Athay; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	930106 CA
Plaintiff/Appellee,	:	Case No. 930106-CA
v.	:	
GREGORY MORRIS MATISON, aka GERALD MORRIS, aka MORRIS GREGORY MATISON,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(1990), IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SEVIER COUNTY, STATE OF UTAH, THE HONORABLE DON V. TIBBS, PRESIDING.

JAN GRAHAM (1231)
Attorney General
RALPH E. CHAMNESS (6511)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

D. GILBERT ATHAY (0143)
72 East 400 South, Suite 325
Salt Lake City, Utah 84111
Telephone: (801) 363-7074
Attorney for Defendant

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Telephone: (801) 538-1022

Attorneys for Appellee

D. GILBERT ATHAY (0143)
72 East 400 South, Suite 325
Salt Lake City, Utah 84111
Telephone: (801) 363-7074
Attorney for Defendant

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of possession of a controlled substance (marijuana), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2) (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the officer have a reasonable suspicion of other criminal activity to support the investigative detention of defendant beyond the scope of detention permitted for a traffic stop?

This issue is one of fact under which the trial court's findings will be reversed only if they are clearly erroneous. State v. Mendoza, 748 P.2d 181, 183 (Utah 1987). Factual findings are not clearly erroneous unless they are against the clear weight of the evidence, or the appellate court reaches a

"definite and firm conviction" that the trial court was mistaken. State v. Webb, 790 P.2d 65, 82 (Utah App. 1990).

2. Was defendant's consent to search the car he was driving given voluntarily?

The question of whether or not a consent to search is voluntary is a mixed question of fact and law; this Court may reverse the trial court's factual findings only if they are clearly erroneous, however this Court reviews the ultimate conclusion of voluntariness for correctness. State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 2058-60 (1973)).

3. Did the trial court correctly find that defendant lacked a reasonable expectation of privacy in the searched luggage when defendant presented conflicting evidence to support his assertion of a claim in that luggage?

The trial court's determination of whether or not defendant demonstrated a subjective expectation of privacy in the object of the challenged search is one of fact, that is reviewed for clear error. State v. Taylor, 818 P.2d 561, 565 (Utah App. 1991).

4. Has defendant demonstrated that this Court should depart from the well established federal standard for determining voluntariness of consent to search by requiring officers to inform suspects that under article I, section 14 of the Utah Constitution they may refuse consent?

The interpretation of a constitutional provision presents a question of law that this Court reviews for correctness. State v. Mitchell, 824 P.2d 469, 471 (Utah App. 1991).

5. If this Court formulates a new requirement for law enforcement should that rule only be applied prospectively?

This issue is governed by the same standard of review as issue 5.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

The State charged defendant with possession of a controlled substance (marijuana), a second degree felony, in violation of Utah Code Ann. § 58-37-8(2) (1990) (R. 1).

Defendant moved to suppress the marijuana seized from luggage in the trunk of a vehicle he was driving at the time of the traffic stop (R. 22-23, 50-80). Following an evidentiary hearing (R. 120-62), the trial court denied defendant's motion (R. 34-37) (a complete copy of the court's findings is contained in Addendum A).

The court tried the case based on the transcript of the suppression hearing and a video of the investigatory stop (R.

167-71).[1] The court found defendant guilty based on the stipulated evidence (R. 174). However, pursuant to Utah Code Ann. § 76-3-402 (Supp. 1992), the trial court reduced defendant's conviction one degree and sentenced defendant to zero to five years in the Utah State Prison and imposed a $5,000 fine (Tr. Jan. 19, 1993 at 11). The court suspended the sentence and fine on condition that defendant serve one year in the Sevier County Jail subject to review after 90 days with a reduction of the fine to $1,250 and the statutory surcharge (Tr. Jan. 19, 1993 at 12). The trial court stayed defendant's sentence during the pendency of this appeal (Tr. Jan. 19, 1993 at 14).

STATEMENT OF THE FACTS

The trial court's Findings of Fact and Conclusions of Law accurately recite the facts pertinent to this appeal (R. 34-38) (Addendum A). The court's findings are therefore reproduced here, adding citations to the transcript of the preliminary hearing,[2] transcript of the hearing on the motion to suppress and to a video tape of the stop (Exhibit 1):

> 1. On January 14, 1992, Deputy Phil Barney was traveling to the Salina interchange of I-70 when he observed a vehicle which had just come off the eastbound lanes of I-70 at such exit (R. 100, 126).

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[1]The parties stipulated that the material seized was marijuana and that there were 138.25 pounds of it (R. 167-69).

[2]The transcripts of the preliminary hearing and arraignment were not part of the stipulated evidence heard at trial. However, Judge Don V. Tibbs presided at all hearings involving the defendant. Defendant relies on these transcripts in his brief (Br. App. at 5) and the State will as well.

2. Deputy Barney observed the vehicle "fish tail" (R. 100, 101, 127) as it came onto the access road from the freeway and then the vehicle stopped at a gas station/convenience store (R. 100, 101, 128).

3. Deputy Barney drove up to the freeway underpass where the vehicle had been out of control to determine whether the action was the result of icy conditions and observed that the road was dry (R. 100, 101, 102, 127).

4. The officer observed that the driver of the vehicle was still stopped at the business establishment and commenced traffic enforcement activities on I-70 east of Salina (R. 102, 128).

5. Upon subsequently observing the vehicle traveling eastbound out of Salina and knowing that there are no services for 110 miles in such direction (R. 129), Deputy Barney decided to stop the vehicle to determine whether the driver was impaired or why the driver was unable to control the vehicle at the Salina interchange (R. 102, 129).

6. The officer stopped the vehicle at 1:33 p.m. as shown on the video tape recording of the scene of the stop (Exhibit 1).

7. When the officer approached the Defendant's vehicle, the Defendant asked, "What am I being stopped for? Am I speeding?" (Exhibit 1, R. 131).

8. Deputy Barney responded by indicating that he would explain in a moment and asked for the license and registration to the vehicle (Exhibit 1, R. 102, 131).

9. At 1:34:14 p.m., Deputy Barney explained the reason for the stop and the Defendant stated that he had been having trouble with his cruise control and that was why he was unable to control the vehicle (Exhibit 1, R. 133).

10. Deputy Barney had at this point smelled the odor of fresh ground coffee, an ingredient commonly used to mask the odor of

raw marijuana (R. 106, 132), and noted the extreme nervousness[3] of the Defendant who had offered an unreasonable explanation of his traveling in a vehicle for which he was not the owner (Exhibit 1, R. 103, 104).

11. Deputy Barney asked if the vehicle contained firearms or drugs (Exhibit 1, R. 132, 133-34) and after receiving a negative response (Exhibit 1) asked, "May I look in the vehicle?" (Exhibit 1, R. 105, 134).

12. The Defendant consented at 1:34:35 p.m. (Exhibit 1).[4]

13. At 1:35:50 p.m., Deputy Barney asked the Defendant, "Would you pop the trunk," (Exhibit 1, R. 106-07, 134) and the Defendant opened the trunk (Exhibit 1, R. 134).

14. Upon observing the suitcases in the trunk (Exhibit 1, R. 108-09) and smelling the suitcase (R. 109, 134), Deputy Barney handcuffed the Defendant and arrested him at 1:36:38 p.m. (Exhibit 1, R. 109, 134).

15. At 1:38:02, Deputy Barney opened one of the cases sufficiently to observe marijuana (Exhibit 1, R. 108-09, 134).

16. The vehicle was found to contain 138.25 pounds of marijuana (R. 106, 168).

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[3]The trial court's reliance on nervousness is misplaced. Although it may be probative in some circumstances, in this case there was neither testimony about the degree of defendant's nervousness as compared to typical cases, nor testimony about the manifestations of nervousness. Accordingly, that fact does not contribute to a reasonable suspicion in this case.

[4]Officer Barney asked about the contents of defendant's pants pockets when he observed a bulge in defendant's pocket. Apparently he was concerned that defendant might be carrying a weapon (Exhibit 1). See State v. Dorsey, 731 P.2d 1085, 1092 (Utah 1986) (Zimmerman, J. concurring) (police officer was justified in frisking an individual suspected of transporting narcotics because such individuals "might be armed to protect themselves").

Based on the above findings of fact, the court denied defendant's motion to suppress. The court further determined:

> 1. The Defendant submitted no evidence or testimony regarding his claim of interest in the substance seized or the contents of the vehicle and he lacks standing to challenge the search.
>
> 2. The initial traffic stop of the vehicle was pursuant to a legitimate law enforcement function.
>
> 3. The Defendant, upon being asked about the presence of firearms or drugs, voluntarily consented to open the vehicle for inspection.
>
> 4. The officer used no threats or coercion and the Defendant's actions were voluntary.

(R. 34-38) (Addendum A).

SUMMARY OF ARGUMENT

The trial court's implicit finding that Deputy Barney's continued investigative detention of defendant beyond the scope of a traffic stop was supported by a reasonable suspicion of criminal activity is amply supported by the record. The trial court correctly found that defendant voluntarily consented to the search of the vehicle and trunk based on the fact that there was no coercion or threats made by Deputy Barney. After defendant opened the trunk for Deputy Barney, the odor of marijuana and known masking agents established probable cause for a warrantless search of the luggage in the trunk. Moreover, even if this Court determines that the consent is somehow tainted, the trial court correctly concluded that defendant failed to meet his burden of showing an expectation of privacy in the luggage. Accordingly, defendant may not challenge the legality of the search.

This Court should not depart from the well established federal standard for determining voluntariness of consent. Defendant fails to demonstrate that the Utah Constitution requires the State to show that voluntary consent can only be given with knowledge of the right to refuse consent. Accordingly, this Court should reject defendant's expansive interpretation of article I, section 14 of the Utah Constitution. If this Court creates such a rule, that rule should apply prospectively and have no retroactive affect.

ARGUMENT[5]

POINT I

THE OFFICER HAD A REASONABLE SUSPICION THAT DEFENDANT WAS TRANSPORTING NARCOTICS WHEN HE ASKED ADDITIONAL QUESTIONS BEYOND THE SCOPE OF THE INITIAL TRAFFIC STOP.

The trial court's determination that the stop and detention of defendant were supported by reasonable suspicion is not clearly erroneous (R. 35). Indeed, defendant does not challenge the propriety of the initial stop. Br. of App. at 13.[6] In Point II of his brief, defendant asserts that he "was

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[5]Defendant labels his issues as focusing on article I, section 14 of the Utah Constitution. Br. of App. at 2. However, with the exception of his argument in Point IV, he relies on analysis of the fourth amendment of the United States Constitution as interpreted by Utah and federal courts. Consequently, with the exception of that issue, the State will not analyze the issues under the Utah Constitution, but will, like defendant, engage in fourth amendment analysis. State v. Bobo, 803 P.2d 1269, 1273 (Utah App. 1990).

[6]This position is proper in light of the undisputed facts. Deputy Barney testified that he stopped defendant because he saw the vehicle "fish tail as it entered US-50" (R. 127). Defendant admitted to "fishtailing" on the videotape of the stop (Exhibit

detained without an articulable or reasonable suspicion that he was involved in criminal activity [following the stop]." Br. of App. at 18. Defendant's analysis ignores critical trial court findings and analysis.

An investigative detention of a vehicle "'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" State v. Higgins, 837 P.2d 9, 11 (Utah App. 1992) (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)), cert. granted, 857 P.2d 948 (Utah May 18, 1993); State v. Johnson, 805 P.2d 761, 763 (Utah 1991). See State v. Robinson, 797 P.2d 431, 435 (Utah 1990) ("[a]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation;" however, unless there is reasonable suspicion of criminal activity beyond the traffic violation, the detention must end).

Based on this Court's caselaw, Deputy Barney's questions about narcotics and firearms went beyond the scope of the initial traffic stop. State v. Robinson, 797 P.2d 431, 436 (Utah App. 1990); State v. Castner, 825 P.2d 699, 703 (Utah App. 1992); State v. Godina-Luna, 826 P.2d 652, 655 (Utah App. 1992). However, defendant's detention beyond this initial purpose was justified by a reasonable suspicion of additional wrongdoing. See State v. Bradford, 839 P.2d 866, 869 (Utah App. 1992) (an

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1). Deputy Barney testified that he was concerned that defendant might be impaired or that there might be a safety problem since defendant was driving in a direction where there were no services for 100 miles (Exhibit 1, R. 129).

officer may detain an individual beyond initial purpose of stop, "only if, during the course of the traffic stop, the officer discovers acts which give him or her reasonable suspicion of other more serious criminal activity").

This Court has recognized that "the odor of marijuana 'has a distinct smell' and can alone 'satisfy the probable cause requirement to search[.]'" State v. Dudley, 847 P.2d 424, 426 (Utah App. 1993) (quoting United States v. Morin, 949 F.2d 297 300 (10th Cir. 1991)). See also State v. Naisbitt, 827 P.2d 969, 972-73 (Utah App. 1992) (same). Specifically, Deputy Barney smelled the "very heavy" odor of coffee grounds when he first approached defendant's window (R. 132).[7] The trial court found that coffee grounds are commonly used to mask the odor of illegal drugs (R. 36). This finding is amply supported by decisions from other courts. See, e.g., United States v. Olivier-Becerril, 861 F.2d 424, 425 (5th Cir. 1988) ("[i]nside the trunk the agent found several bags of coffee . . . . The agent knew that coffee was sometimes used to mask the odor of narcotics"); United States

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[7]As this Court stated in State v. Menke:

> The trained law enforcement officer is in a different position than the average citizen in that he or she "may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer. . . . The officer is entitled to assess the facts in light of his experience."

787 P.2d 537, 541 (Utah App. 1990) (quoting State v. Trujillo, 739 P.2d 85, 88-89 (Utah App. 1987)). Officer Barney's undisputed experience and the articulated facts rendered the additional questioning of defendant permissible.

v. Adamo, 882 F.2d 1218, 1222 (7th Cir. 1989) ("[defendants] flew from New York to Peoria with a plastic bag containing six ounces of cocaine sealed within a second plastic bag containing coffee grounds, in an attempt to conceal the cocaine odor"); United States v. Scales, 903 F.2d 765, 767 n.3 (10th Cir. 1990) ("coffee grounds are used by narcotics traffickers to disguise the odor of drugs"); United States v. Boucher, 909 F.2d 1170, 1172 (8th Cir. 1990) ("[officer] knew [coffee grounds, air freshener, and ammonia] are commonly used to disguise the odor of narcotics from humans and dogs"); United States v. Padron, 657 F.Supp. 840, 848-49 (D.Del. 1987) ("[d]efendants argue that it was objectively impossible to smell the raw marijuana because it was enclosed in plastic ziplocked bags, surrounded by coffee grounds"); People v. Small, 252 Cal.Rptr. 41, 43 (Cal.App.3 Dist. 1988) ([m]ethamphetamine found with "several damp coffee filters that contained a strong odor"); Kemp v. State, 411 S.E.2d 880, 881 (Ga.App. 1991) ("[b]ecause the package emitted a strong odor of coffee, a substance drug dealers sometimes use to mask the odor of cocaine, the package was opened . . . and approximately 500 grams of cocaine were discovered"). The smell of a distinctive masking agent, therefore, was sufficient under the less stringent reasonable suspicion standard, to support Deputy Barney's investigatory detention beyond the scope of a traffic stop. Dudley, 847 P.2d at 426 n.1.

Defendant fails to acknowledge or challenge these critical facts and fails to recognize their significance in

establishing reasonable suspicion to justify Deputy Barney's decision to investigate the possibility of drug trafficking. See Br. of App. Point II. By ignoring the trial court's factual findings, and the evidence in support of those findings, defendant fails to demonstrate clear error in either the trial court's credibility determinations, or its implicit finding of reasonable suspicion for the continued detention beyond the purpose of the initial traffic stop. This Court should affirm the trial court's ruling.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT CONSENTED TO DEPUTY BARNEY'S REQUEST TO SEARCH THE CAR. THE TRIAL COURT'S ULTIMATE CONCLUSION THAT THIS CONSENT WAS VOLUNTARY IS CORRECT.

In Points III and IV of his brief, defendant asserts the trial court erred in finding that he voluntarily consented to the search of the car or its contents. Br. of App. at 19-33. Alternatively, assuming his consent was voluntarily given, defendant complains that the trial court failed to determine whether his consent was sufficiently attenuated from the alleged illegal stop. Br. of App. 33-37. Defendant's contentions lack merit.

A. Standard of Review for Voluntariness of Consent

In State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993), the supreme court resolved a split between panels of this Court as to the appropriate standard of review of a trial court's determination of the voluntariness of a consent to search. It

held that "the trial court's ultimate conclusion that a consent was voluntary or involuntary is to be reviewed for correctness[;] [however,] [t]he trial court's underlying factual findings will not be set aside unless they are found to be clearly erroneous." 846 P.2d at 1271 (citations omitted).

B. Voluntariness Standard

A warrantless search conducted pursuant to voluntary consent is valid under the fourth amendment. State v. Sepulveda, 842 P.2d 913, 918 (Utah App. 1992). "'[W]hether the requisite voluntariness exists depends on the "totality of all the surrounding circumstances - both the characteristics of the accused and the details" of police conduct.'" Thurman, 846 P.2d at 1262-63 (quoting State v. Arroyo, 796 P.2d 684, 689 (Utah 1990), in turn quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). "[B]oth the 'characteristics of the accused' and the 'details of police conduct' must be considered in determining whether a defendant's consent was actually a product of his or her free will." Id. at 1263 (citations omitted). The burden of proving the voluntariness of consent falls on the prosecution. Id.

C. Voluntary Consent Finding is Correct

Defendant misstates the record and fails to marshal the evidence in support of the trial court's findings underlying its determination that the consent to search was voluntary. He therefore fails to demonstrate that the trial court's finding that he consented to the search is clearly erroneous (R. 36). He

likewise fails to demonstrate that the trial court's ultimate conclusion that this consent was voluntary is incorrect (R. 37).

> The trial court specifically found:
>
> 12. The Defendant consented at 1:34:35 p.m. (Exhibit 1).
>
> . . .
>
> 3. The Defendant, upon being asked about the presence of firearms or drugs, voluntarily consented to open the vehicle for inspection.
>
> 4. The officer used no threats or coercion and the Defendant's actions were voluntary.

(R. 37), (Exhibit 1), see Addendum A. Ignoring these findings of the trial court, Defendant alleges:

> The deputy then directed that the search be made of the trunk. When the Appellant hesitated, the deputy ordered him to open the trunk. He asked the Appellant what he had to hide. The Appellant was put in a position of either admitting there was contraband in the vehicle or stating that there was no good reason why the trooper could not look in the trunk.

Br. of App. at 23. The record is devoid of any evidence that this description of the events is accurate. Rather, the record clearly shows that Deputy Barney asked defendant "Would you pop the trunk?" (Exhibit 1), (R. 106-07, 134). He never "ordered" defendant to open any part of the car. Likewise, Deputy Barney never asked defendant "what he had to hide." Br. App. at 23, (Exhibit 1). Defendant's misrepresentation of the facts in this case should lead this Court to disregard his claim of error.[8]

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[8]"Referring to matters that are not part of the record in the trial court . . . [is] entirely inappropriate and irrelevant to this proceeding. We do not consider such material." State v.

The trial court made the following findings concerning the voluntariness of defendant's consent: Deputy Barney asked if he could "look in the vehicle," (R. 36) to which defendant responded, "Yes, sir", (Exhibit 1), (R. 36). After searching the interior, the deputy asked defendant, "would you pop the trunk?" (Exhibit 1). Defendant unhesitatingly opened the trunk, never attempted to limit the scope of the search and never complained about the scope of the search, (Exhibit 1). Based on these facts, the court properly concluded that "[d]efendant voluntarily consented to the search and there is no evidence of coercion" (R. 37).

D. Attenuation Analysis Unnecessary

Finally, this Court need not consider defendant's additional complaint that the trial court failed to determine whether his consent was attenuated from the alleged illegal stop under State v. Arroyo, 796 P.2d 684 (Utah 1990). Br. of App. at 33-37. See also Thurman, 846 P.2d at 1262 (clarifying Arroyo). Defendant has not demonstrated that Deputy Barney's search request was preceded by any illegality; thus, there was no need for the trial court to engage in an attenuation analysis below. Accordingly, this Court need not engage in an attenuation analysis on appeal. See State v. Harmon, 854 P.2d 1037, 1040 n.1 (Utah App. 1993) (attenuation analysis applies only if a prior

Cook, 714 P.2d 296, 297 (Utah 1986); see also State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982) (reviewing court will not rule on a question that depends upon alleged facts unsupported by the record).

police illegality exists). If this Court determines that a prior illegality did occur, the proper remedy is to remand this case to the trial court in order for that court to engage in the attenuation analysis required by Thurman.

POINT III

THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT DID NOT DEMONSTRATE A SUBJECTIVE EXPECTATION OF PRIVACY IN THE SEARCHED LUGGAGE. ACCORDINGLY, HE CANNOT CHALLENGE THE PROPRIETY OF THAT SEARCH. ALTERNATIVELY, THIS COURT MAY AFFIRM SINCE THE OFFICER HAD PROBABLE CAUSE TO SEARCH ONCE DEFENDANT OPENED THE TRUNK OF THE CAR.

A. The Trial Court Correctly Found That Defendant Did Not Demonstrate a Subjective Expectation of Privacy in the Searched Luggage.

The trial court, after reviewing the video tape, (Exhibit 1), the testimony of Deputy Barney, the arguments of counsel and detailed memoranda, concluded:

> 1. The Defendant submitted no evidence or testimony regarding his claim of interest in the substance seized or the contents of the vehicle and he lacks standing to challenge the search.

(R. 37).[9] Defendant fails to demonstrate clear error in this

[9]The State recognizes that under this Court's holding in State v. Sepulveda, 842 P.2d 913, 916 (Utah App. 1992), that defendant's claim that a "friend" had loaned him the car (Exhibit 1) may be sufficient to assert a subjective interest in the interior and trunk of the car. However, defendant's failure to demonstrate a subjective interest in the luggage where Deputy Barney discovered the marijuana is fatal to his claim.

finding.[10] Therefore, he cannot complain about any alleged illegality.

In order to challenge the legality of the search, defendant must demonstrate that the search violated his fourth amendment rights. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 430 (1978)); Marshall, 791 P.2d at 886. To meet this burden, defendant must show that he subjectively expected that the searched area was private to him and that this expectation was legitimate in the view of society. State v. Scott, No. 920601-CA, slip op. at 4 (Utah App. October 8, 1993) (citing Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967); Rakas, 439 U.S. at 143 n. 12, 99 S.Ct. at 430 n.12; Marshall, 791 P.2d at 887 (defendant's burden "to develop the relevant facts below").

After defendant opened the trunk, Deputy Barney, upon observing the luggage, asked "Whose is this?" Defendant replied "It's mine." Deputy Barney then asked "It's all yours?" Defendant replied "Yeah." Deputy Barney then questioned "Marijuana?" To this question defendant responded "No."

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[10]State v. Taylor sets out a bifurcated standard of review for this issue. "The first step involves a determination of whether the individual has demonstrated 'a subjective expectation of privacy in the object of the challenged search.' We review the pertinent findings under a clearly erroneous standard." 818 P.2d 561, 565 (Utah App. 1991) (citations omitted). The ultimate conclusion of whether or not society would recognize that subjective expectation is then reviewed for correctness. Id. Accord United States v. Jefferson, 925 F.2d 1242, 1248-49 (10th Cir. 1991); United States v. Eyster, 948 F.2d 1196, 1209 (11th Cir. 1991). Therefore, when the individual fails to carry his burden under the first prong (as defendant failed to do here), there is no reason to reach the second prong. Rakas v. Illinois, 439 U.S. 128, 150, 99 S.Ct. 421, 430 (1978).

However, defendant, once handcuffed, responded to the question of "How much do you have in here?" by stating "I don't know what's in, I don't know." Again, when Deputy Barney asked, "Whose are these?" Defendant replied, "I don't know." Deputy Barney then stated "You don't know whose they are?" Defendant responded, "I don't know, well, those suitcases are Jerry's but some of the stuff was in the trunk of the car." (Exhibit 1).

During the hearing on the motion to suppress, defendant presented no other evidence to support his claim of a subjective interest in the luggage and marijuana in the trunk of the car. This Court in Scott recognized that where a defendant fails to demonstrate "an interest in the property seized, he has not demonstrated an expectation of privacy and thus has no standing to challenge the search." Scott, slip op. at 4 (emphasis added). As this Court stated in Marshall,

> [defendant] has the ultimate burden of proof to establish that his fourth amendment rights were violated or, to put it otherwise, that he had an expectation of privacy in the . . . articles seized.

791 P.2d at 886. Here, the trial court found that defendant's ambiguous statements were insufficient to meet this burden of proof. This failure demonstrated defendant's lack of a subjective interest of privacy in the luggage where Deputy Barney found the marijuana.

On appeal defendant reasserts his claim that he was a "bailee" of the luggage and therefore had a legitimate privacy interest the luggage. See Br. of App. 6-13 and (R. 51-56).

However, defendant never presented any evidence to support his claim that a bailment had been created between himself and someone else. He merely asserted in his supporting memorandum, and asserts again on appeal, that he was the bailee of the luggage. Br. of App. at 6-13 and (R. 51-56).

This Court has recognized that:

> The factor determining whether the transaction is a bailment is whether the bailor surrenders possession and control over the property to the owner of the premises where the property is placed.

McPherson v. Belnap, 830 P.2d 302, 304 (Utah App. 1992). Defendant failed to show the existence of any "bailor" in this case.[11]

As this Court stated in Scott,

> Since the defendant did not have a legitimate expectation of privacy, he has no standing to challenge the constitutionality of the search. Therefore, the trial court properly denied his motion to suppress the discovered evidence.

Scott, slip op. at 5-6. Defendant fails to demonstrate that the trial court incorrectly concluded that he had no standing to challenge the search of the luggage. This Court should affirm that conclusion.

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[11]Defendant cites to United States v. Benitez-Arreguin, 973 F.2d 823 (10th Cir. 1992), for the proposition that possession of luggage as a bailee is sufficient to find an expectation of privacy. However, defendant ignores that the Tenth Circuit held that "[a] proponent of a motion to suppress who relies upon the lawful possession factor bears the burden of presenting at least some evidence that his or her possession was lawful." Id. at 828. Defendant failed to present any evidence that he lawfully possessed the luggage.

B. This Court May Affirm the Trial Court's Denial of the Motion to Suppress on the Alternative Ground that Deputy Barney had Probable Cause to Search the Luggage Once Defendant Opened the Trunk.

Even if this Court concludes that defendant established an expectation of privacy in the searched luggage, this Court should affirm the trial court's denial of the motion to suppress on the alternative ground that the search of the luggage was reasonable based on probable cause. State v. Potter, No. 920579, slip op. at 3-4 (Utah App. September 8, 1993) ("we may affirm on any proper ground"). Once Deputy Barney smelled marijuana along with known masking agents, he had probable cause to search the source of those odors. The smell of marijuana alone created probable cause allowing a warrantless search of the luggage in the trunk.

Deputy Barney testified that after defendant opened the trunk, "There was a heavy smell again of, aside of coffee grounds, lying--oh, the sight of coffee grounds, lying all across the trunk, also a smell of--later identified as fabric softener, these type sheets that are put in a dryer. And I could also smell marijuana." (R. 134). This Court has recognized that "the odor of marijuana 'has a distinct smell' and can alone 'satisfy the probable cause requirement to search[.]'" State v. Dudley, 847 P.2d 424, 426 (Utah App. 1993) (quoting United States v. Morin, 949 F.2d 297 300 (10th Cir. 1991)). See also State v. Naisbitt, 827 P.2d 969, 972-73 (Utah App. 1992) (same). Moreover, the odors of known masking agents provided further indication of illegal activity. As this Court stated in State v.

Bartley, "[i]t is well-established that probable cause for arrest may arise from an officer's sense of smell." 784 P.2d 1231, 1236 (Utah App. 1989). See footnote 6, supra. See also United States v. Medina, 543 F.2d 553 (5th Cir. 1976) ("The officer had probable cause to search the car after appellant ran the checkpoint, after his car interior smelled of air freshener, and after he denied having a key to the trunk."); United States v. Reyna, 546 F.2d 103 (5th Cir. 1977) ("probable cause to search was established . . . by the discernible odor of air-freshener in the car, the nervousness of the passenger, and the unbelievable story told by the driver about the missing trunk key."); United States v. Koenig, 856 F.2d 843, 845 (7th Cir. 1988) ("Cocaine is ofttimes packed in laundry products to mask its smell. . . . wrapped in fabric softener sheets, he found two transparent plastic bags containing white powder"); United States v. Rich, 992 F.2d 502, 504 (5th Cir. 1993) ("The suitcase contained marijuana packed in fabric softener tissues"); State v. Johnson, 516 So.2d 1015, 1017 (Fla.App. 5 Dist. 1987) ("The trooper explained that fabric softener was often used to conceal the odor of marijuana"); State v. Rosborough, 615 P.2d 84, 85 (Ha. 1980) ("The chemical odor emanated from two plastic air fresheners, an apparent attempt to disguise the scent of marijuana"); State v. Thompson, 543 So.2d 1077, 1079 (La.App. 2 Cir. 1989) ("five years of experience in traffic stops and drug arrests had taught him that these aromas [fabric softener or air freshener] were sometimes used in an attempt to mask the odor of marijuana");

State v. Cabanas, 594 So.2d 404, 406 (La.App. 1 Cir. 1991) ("a heavy odor of fabric softener is sometimes used to mask illegal drugs in order to thwart detection by drug detector dogs"); State v. Garza, 853 S.W.2d 462, 464 (Mo.App.S.D. 1993) ("the air fresheners were there to disguise the odor of marijuana"); Murillo v. State, 850 S.W.2d 198, 199 (Tex.App.-Houston[14th Dist.] 1993) ("[Officer] opened the bag and noticed a strong odor of fabric softener which he had learned from past investigations is used to cover up the smell of narcotics"); State v. Earl, 716 P.2d 803, 805 (Utah 1986) (factors suggesting defendant was a drug courier included fact that car contained "strong air fresheners").

Since Deputy Barney had probable cause to search at this time, the issue of whether defendant's consent to search included the luggage becomes moot. See Naisbitt, 827 P.2d at 971-72. This Court can, therefore, affirm the trial court's denial of the motion to suppress based on this alternative ground.

POINT IV

DEFENDANT FAILS TO DEMONSTRATE ANY REASON THAT THIS COURT SHOULD DEPART FROM THE WELL ESTABLISHED FEDERAL STANDARD FOR DETERMINING VOLUNTARINESS OF CONSENT TO SEARCH BY REQUIRING OFFICERS TO INFORM SUSPECTS THAT UNDER THE UTAH CONSTITUTION THEY MAY REFUSE CONSENT.

The question of whether article I, section 14 of the Utah Constitution requires that the State prove that a person was aware of his right to decline a request to search before a

consent to that search may be deemed valid was previously raised in State v. Bobo, 803 P.2d 1268, 1272 (Utah App. 1990). In Bobo, this Court refused to reach the issue because of inadequate briefing. Id. However, in a footnote, the Bobo court suggested a three part analysis to employ when advancing novel state constitutional arguments: 1) Counsel should offer analysis of the unique context in which Utah's constitution developed; 2) Counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from their federal counterparts; and 3) Citation should be made to authority from other states supporting the particular construction urged by counsel. Id. at 1272 n.5. An analysis of defendant's proposed construction of article I, section 14 demonstrates that there is no basis for departing from the federal standard for determining voluntariness of consent to a search.

1. The Historical Context Surrounding the Adoption of Article I, Section 14 Weighs Against Departing from the Federal Standard for Determining Voluntariness of a Consent to Search.

The first factor to consider in advancing a state constitutional argument is the historical context in which the particular provision under review was adopted. Defendant argues that because the early Mormon pioneers came to Utah to avoid religious and political persecution, and that because the practice of polygamy prompted the passage of federal criminal laws that resulted in the prosecution of Utah residents and the forfeiture of their property, "it is unquestionable that the Utah

State Constitution was intended to limit the power of the government to a greater extent than the same federal constitutional provisions." Br. of App. at 27. Because many framers of the Utah Constitution were polygamists whose homes had been searched by federal anti-polygamy agents, the argument goes, they must have contemplated broader state search and seizure protections than were provided under the federal constitution. While at first glance defendant's argument may have some appeal, closer scrutiny reveals that it is significantly flawed.

If the framers of Utah's constitution were dissatisfied with the scope of protection provided by the fourth amendment, they would have drafted a textually different search and seizure provision instead of adopting language that is nearly identical to that of the fourth amendment. Instead, the framers drafted an entirely separate state constitutional provision for the protection of religious freedom: "No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship . . . ." Utah Const. art. III.[12] See K. Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah State Constitution, Article I, Section 14, 17 Utah J. Contemp. L. 267, 280 (1991). Having thus specifically protected religious practices, it is reasonable to

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[12] Article III then goes on to state, "but polygamous or plural marriages are forever prohibited." Having thus rejected the very practice that prompted the resented federal searches, it is reasonable to believe that the drafters of the state constitution assumed that those searches would become less of a problem.

believe that the drafters of Utah's constitution saw no reason to expand state protections against searches that were unrelated to such practices.

Moreover, relying on the "views" of one religious segment and giving that group's views conclusive weight in interpreting the Utah constitution is problematic. A careful reading of the historical record shows that "Mormons were particularly disturbed by the federal criminal machinery that was responsible for criminal prosecutions." Cassell, The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example, P.63, unpublished article to be published in Fall 1993 Utah Law Review. To the extent that the historical experience of Mormons is particularly relevant, it certainly does not argue for a more expansive interpretation of restrictions for State law enforcement. Id.

A review of the history of article I, section 14 provides additional support for the proposition that the framers of Utah's constitution did not intend Utah's search and seizure provision to be interpreted differently than its federal counterpart.[13] The development of Utah's search and seizure provision prior to the adoption of article I, section 14 reflects

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[13] The only reference to Article I, Section 14 at the Constitutional Convention of 1895 was as follows:

> The Chairman: Gentlemen, we will take up section 14,
>
> Section 14 was read and passed without amendment.

1 Official Report of Proceedings and Debates of the Convention: 1895 319 (1898).

a steady movement by the framers toward adoption of the precise wording of the fourth amendment. (See Addendum B of this brief for a textual history of article I, section 14.) With each progressive revision of Utah's search and seizure provision, its language became more similar to that of the fourth amendment. Indeed, only its original 1849 version is significantly different from the fourth amendment. The drafters jettisoned that language in 1872 in favor of language very similar to that of the fourth amendment. Each successive revision from that point forward constituted only minor stylistic changes until the current provision, which is virtually identical to the fourth amendment, was adopted in 1895.

That the framers of the Utah Constitution adopted language so similar to the fourth amendment is significant because it suggests an intent to provide protections equivalent to those provided under the federal provision. In contrast, it is obvious that when they intended to provide more expansive protections than those provided under the federal constitution, the framers of the Utah Constitution signaled that intent by drafting provisions that were textually distinct from those of the federal constitution. For instance, the provisions of Utah's constitution dealing with religious freedom and other inalienable rights are very different from their federal counterparts. See Utah Const. art. I, §§ 1 & 4. Instead of merely adopting the language of the first amendment, the framers of Utah's constitution drafted detailed religious freedom and separation of

church and state provisions. Ibid. Had the framers similarly intended the state's search and seizure provision to provide protections different from those afforded to citizens under the federal constitution, then article I, section 14 surely would feature more detailed and expansive language than that of the fourth amendment.

Neither the Utah Supreme Court nor this Court have claimed that the drafters of article I, section 14 intended that it be construed differently than the fourth amendment. Indeed, Utah's court have implicitly recognized that there is nothing in Utah's history, and especially the history of article I, section 14, that justifies departing from the federal search and seizure standards developed under the fourth amendment. Instead of relying upon the historical context in which article I, section 14 was adopted as the basis for rejecting federal search and seizure law, Utah's courts have departed from the federal standards only in the limited circumstances articulated in State v. Watts, 750 P.2d 1219 (Utah 1988), as discussed in the next section.

2. Although the Language of Article I, Section 14 is Nearly Identical to that of the Fourth Amendment, the Utah Provision May Be Interpreted Differently From the Federal Provision Under the Narrow Circumstances Articulated in State v. Watts.

According to Bobo, the second factor to analyze in developing novel state constitutional arguments is the appellate treatment of state constitutional provisions that are textually similar to their federal counterparts. The Utah Supreme Court

has already articulated its position with respect to how article I, section 14 should be interpreted. As explained in State v. Watts, 750 P.2d 1219 (Utah 1988):

> Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment, and thus this Court had never drawn any distinctions between the protections afforded by the respective constitutional provisions. Rather, the Court has always considered the protections afforded to be one and the same.

Watts, 750 P.2d at 1221. See also State v. Jasso, 439 P.2d 844 (Utah 1968); State v. Criscola, 444 P.2d 517 (Utah 1968); State v. Lopes, 552 P.2d 120 (Utah 1976) (all construing article I, section 14 as providing the same scope of protection as the fourth amendment).

However, the Utah Supreme Court in Watts also noted:

> In declining to depart in this case from our consistent refusal heretofore to interpret article I, section 14 of our constitution in a manner different from the fourth amendment to the federal constitution, we have by no means ruled out the possibility of doing so in some future case. Indeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given the fourth amendment by the federal courts.

Watts, 750 P.2d at 1221 n.8 (citations omitted).

Since Watts, both the Utah Supreme Court and this Court have, in specific settings, given article I, section 14 a different interpretation than that given to the fourth amendment. However, it is clear that article I, section 14 may be given an interpretation different from that given to the fourth amendment

only under the limited circumstances enunciated in Watts. Moreover, in each instance where Utah's courts have departed from federal search and seizure standards, they have done so because of inconsistencies or confusion in the federal analysis. See State v. Thompson, 810 P.2d 415 (Utah 1991) (rejecting United States v. Miller, 425 U.S. 435 (1976)); State v. Larocco, 794 P.2d 460, 466 (Utah 1990) (plurality opinion) (rejecting New York v. Class, 475 U.S. 106 (1986)); State v. Sims, 808 P.2d 141, 149 (Utah App. 1991), cert. granted, 853 P.2d 897 (Utah Feb. 5, 1993) (clarifying Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990)).

Considered collectively, Watts, Larocco, Sims and Thompson make clear that article I, section 14 should generally be interpreted as is the fourth amendment by the federal courts. Only in those instances where the federal courts have vacillated between various standards such that "the vagaries of inconsistent interpretations [of] the fourth amendment" Watts, 750 P.2d at n. 8, have become so prevalent that it is necessary "to simplify . . . the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures," Larocco, 794 P.2d at 469, should Utah courts embark upon an interpretative journey into the Utah Constitution.

The federal standard for determining voluntariness of a consent to search has been well-established since the United

States Supreme Court decision in Schneckloth. Although Schneckloth has been the target of some criticism among commentators[14], that criticism has remained almost exclusively academic. As demonstrated in the next section, Schneckloth continues to enjoy near universal acceptance among state courts.

3. Nearly Every Jurisdiction Continues to Follow the Totality of Circumstances Test for Voluntariness Enunciated by the United States Supreme Court in Schneckloth v. Bustamonte.

The final factor identified by this Court in Bobo for the analysis of novel state constitutional arguments is citation to authority from other states supporting the particular construction urged by counsel.[15] Bobo, 803 P.2d at 1272-73 n.5. Under this "sibling state" approach, particular attention should be given to those states whose constitutions served as models for the Utah Constitution, as well as to authority from states in the same geographical region.[16] See State v. Jewett, 146 Vt. 221, 500 A.2d 233, 237 (1985) (describing "sibling state" approach) (cited as proper model of state constitutional analysis in, State

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[14] See, e.g., 3 W. LaFave, Search and Seizure: A Treatise On The Fourth Amendment, § 8.1(a), at 152-154 (2d ed. 1987). But see The Supreme Court, 1972 Term, 87 Harv.L.Rev. 55, 218-19 (1973) (although critical of some of the Court's reasoning, the author concludes "the ultimate result in Bustamonte appears to be correct").

[15] For the Court's convenience, the search and seizure provisions from the constitutions of each of the fifty states is provided in Addendum C of this brief.

[16]Defendant totally fails to meet this portion of the Bobo briefing rule. Nowhere in his brief does he cite to the positions of other states in support of his novel approach to this issue.

v. Earl, 716 P.2d 803, 806 (Utah 1986)). Commentators have identified several states whose constitutions served as models for the framers of the Utah Constitution: Illinois, Iowa, Nevada, New York, and Washington.[17] A review of decisions from the courts of these states indicates that none have adopted positions that support defendant's proposed interpretation of article I, section 14.

Even before the Supreme Court decided Schneckloth, Illinois refused "to require that the People show that the consenting party was advised of rights secured by the fourth amendment, [but] the failure to do so is a factor bearing on the understanding [of the] nature of the consent." People v. Haskell, 41 Ill.2d 25, 31, 241 N.E.2d 430, 434 (1968) (citations omitted). Illinois now applies the voluntariness standard articulated in Schneckloth. See, e.g., People v. Sesmas, 591 N.E.2d 918, 922 (Ill.App.3d 1992) ("Moreover, ignorance of knowledge of the right to refuse to consent does not vitiate the voluntariness of the consent but is merely a factor to consider.") (citations omitted).

Similarly, the Iowa Supreme Court has stated that

> the search and seizure provisions of the United States and Iowa Constitutions contain identical language. Consequently, they generally are "deemed to be identical in scope, import, and purpose."

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[17] See Wallentine, supra at 282 and authorities cited therein.

State v. Bishop, 387 N.W.2d 554, 557 (Iowa 1986) (citations omitted). In keeping with this general rule, Iowa adopted Schneckloth and expressly noted that "knowledge of the right to refuse consent is only one factor to be considered in answering the question of voluntariness." State v. Ege, 274 N.W.2d 350, 353 (Iowa 1979) (citing Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2047-48).

Nevada has likewise adopted the Schneckloth standard for determining voluntariness of consent. Reese v. State, 596 P.2d 212, 214 (Nev. 1979). In so doing, the Nevada Supreme Court recognized that one state, New Jersey, had departed from Schneckloth under its state constitution. Id. (citing State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975)). Nevertheless, the Reese court reaffirmed its adherence to Schneckloth, noting that "[t]his court has never indicated that a different standard should apply in this state, but is in accord with the rule that voluntariness [of consent] is a question of fact to be determined from all the circumstances." Id. (citations omitted).

Washington does not appear to have expressly considered departing from Schneckloth. Rather, it has consistently applied the totality of circumstances test for determining voluntariness of consent. See, e.g., State v. Nelson, 734 P.2d 516, 519-520 (Wash. 1987) (citing Schneckloth and several Washington cases in which Schneckloth was applied).

While Wallentine cites the New York Constitution as a possible influence on the framers of the article I, section 14,

Wallentine, supra at 282, he ignores the fact that New York's search and seizure provision, article I, section 12, was not adopted until 1938. Clearly a provision adopted more than forty after Utah's constitution could not have influenced article I, section 14.

Therefore, the fact that New York appears to be the most willing of the states to depart from federal search and seizure law, is irrelevant to an interpretation of article I, section 14. Article I, section 12 of the New York Constitution contains two paragraphs, the first of which is identical to the fourth amendment.[18] However, despite their apparent willingness to depart from federal search and seizure law in other contexts, even New York courts continue to apply the Schneckloth standard for determining voluntariness of consent to search. See, e.g., People v. Khatib, 555 N.Y.S.2d 1008, 1010 (Sup. 1990) (applying Schneckloth and citing several other New York cases in which Schneckloth was applied).

Just as none of the states whose constitutions may have served as models for the Utah constitution have adopted positions that support defendant's proposed interpretation of article I, section 14, neither have any of the western states departed from Schneckloth. See, e.g., State v. Paredes, 810 P.2d 607, 610

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[18] According to Wallentine, the second paragraph of Article I, Section 12 addresses electronic surveillance, and closely parallels an applicable federal statute. Wallentine, supra at note 103 (citing Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1988)).

(Ariz. App. 1991)[19]; People v. James, 561 P.2d 1135, 114, 137 Cal.Rptr. 447, 455 (1977); State v. Bedolla, 806 P.2d 588, 593 n.2 (N.M. App. 1991); Stamper v. State, 662 P.2d 82, 87 (Wyo. 1983); (all applying Schneckloth). Even before Schneckloth was decided, a number of western states rejected the suggestion that police be required to inform a suspect that he had the right to refuse the officer's request for consent to search. See Schneckloth, 412 U.S. at 231 n.14, 93 S. Ct. at 2050 n.14 (citing cases from California, Florida, Idaho, Kansas, Missouri, Nebraska and Oregon, among others). None of these states appear to have since departed from their original positions or from Schneckloth.

More importantly, several of Utah's neighboring states have expressly refused to depart from Schneckloth under their state constitutions. See, e.g., People v. Hayhurst, 571 P.2d 721, 724 n.4 (Colo. 1977) (refusing to require Miranda-type warning under the state constitution and citing several pre-Schneckloth Colorado decisions for the same proposition); State v. Christofferson, 610 P.2d 515, 517 (Idaho 1980) (refusing to require defendants be advised of their right to refuse consent under state constitution and reaffirming its adoption of the federal standard); State v. Stemple, 646 P.2d 539, 541 (Mont.

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[19] See also State v. Knaubert, 550 P.2d 1095, 1099 (Ariz. 1976) ("Defendant has cited no authority [for the proposition] that the Arizona Constitution requires that the record show that an in custody defendant knew that he had the right to refuse to consent to the search. Absent such authority, we are unwilling to apply a more stringent requirement under the Arizona Constitution than is imposed by the Fifth Amendment to the United States Constitution.") (emphasis added).

1982) (refusing to impose a stricter standard under the Montana Constitution than that required under Schneckloth); State v. Flores, 570 P.2d 965, 968 (Or. 1977) (declining to interpret state constitution more restrictively than fourth amendment and rejecting Miranda-type warning requirement).

Expanding the scope of inquiry to include the rest of the states, it is clear that Schneckloth enjoys near universal acceptance. At least four additional states have refused to interpret their state constitutions as requiring a more stringent standard of voluntariness than that required under the fourth amendment. See Frink v. State, 597 P.2d 154, 169 (Alaska 1979) (After noting that the language of article I, section 14 of the Alaska Constitution is almost identical to the fourth amendment, the court held that "[t]he Court in Schneckloth rejected the argument [that the state must prove that defendant knew of his right to refuse consent to the search], and we do not believe that the Alaska Constitution requires a different standard for noncustodial consent searches."); King v. State, 557 S.W.2d 386 (Ark. 1977) ("In our view the Schneckloth standard of required proof in consent to search is adequate under the terms of our constitution. Art. 2, § 15, Ark. Const. (1874)."); State v. Osborne, 402 A.2d 493, 497 (N.H. 1979) (refusing to impose heavier burden under the New Hampshire Constitution than that required under Schneckloth); State v. Rodgers, 349 N.W.2d 453, 459 (Wis. 1984) (declining to adopt different definition of

consent under state constitution than that required under fourth amendment).

Although one court has said that "it would be a good policy for police officers to advise persons that they have a right to refuse to consent to a warrantless search [even though that procedure is not] constitutionally required," Osborne, 402 A.2d at 498,[20] the Schneckloth standard for determining voluntariness of consent enjoys overwhelming acceptance among the states. See also Juarez v. State, 758 S.W.2d 772, 781 n.5 (Tex.Cr.App. 1988) (noting that warning of right to refuse consent is "good police practice," but nevertheless embracing Schneckloth). Moreover, the State has been unable to find even a single court that has decided to require law enforcement to give suspects a Miranda-type consent warning.[21] Indeed, it appears that only two states, Mississippi and New Jersey, have departed from Schneckloth. See State v. Ellis, 586 A.2d 876 (N.J.Super. 1990), and State v. Johnson, 346 A.2d 66 (N.J. 1977) (under the New Jersey Constitution, the validity of a consent to search, even in a noncustodial situation, must be measured in terms of waiver, an essential element of which is knowledge of the right

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[20] But as previously noted, even the court in Osborne refused to depart from Schneckloth under its state constitution. Osborne, 402 A.2d at 497.

[21] After Miranda was decided, at least one commentator predicted that courts would require that police give a "Miranda-type" warning when requesting consent to search. See Wilberding, "Miranda-Type Warnings for Consent Searches?", 47 N.D.L.Rev. 281, 284 (1971). Nevertheless, the concept of Miranda-type warnings for consent searches has been universally rejected by the courts.

to refuse consent); Longstreet v. State, 592 So.2d 16, 19 (Miss. 1991) ("[V]alid consent to an otherwise illegal search must be accompanied by a knowledgeable waiver of a person's constitutional right not to be searched. . . . In other words, for a search which is based on consent alone, it is necessary that the person searched be aware of the right to refuse under the law.") (citing Penick v. State, 440 So.2d 547, 550-51 (Miss. 1983)). Neither New Jersey nor Mississippi have, however, gone so far as to require that police give a Miranda-type warning like that proposed by defendant, and, as noted above, numerous courts have rejected that concept.

The great weight of authority militates against departing from the voluntariness of consent standard articulated in Schneckloth. The State already must meet the heavy burden of proving voluntariness. To impose the additional burden of proving actual knowledge of the right to refuse consent to a search will unnecessarily hinder law enforcement because it will enable defendants who have in fact voluntarily consented to a search to later claim that they did not know they could refuse to consent. Schneckloth, 412 U.S. at 230. Although defendant suggests that a Miranda-type warning would resolve this problem, such a warning unnecessarily shackles law enforcement. Id. at 231. Finally, while some commentators have criticized the voluntariness standard articulated in Schneckloth, the totality of circumstance test has been effectively applied since its inception by nearly every jurisdiction in the country. Unlike

the issues addressed in Thompson, Larocco, and Sims, the analysis of consent searches is not hopelessly complicated by "the vagaries of inconsistent interpretations given the fourth amendment by the federal courts," Watts, 750 P.2d at 1221 n.8, or confounded by the United States Supreme Court's "vacillation" between two diverse standards. Larocco, 794 P.2d at 467. Consequently, there is no justification for departing from Schneckloth under the criterion established by the Utah Supreme Court in Watts and this Court should follow the general rule of adhering to federal search and seizure law.

POINT V

IF THIS COURT DECIDES TO ADOPT A DIFFERENT STANDARD FOR DETERMINING THE VALIDITY OF A CONSENT TO SEARCH THAN THE VOLUNTARINESS STANDARD ESTABLISHED IN SCHNECKLOTH, THEN THIS COURT SHOULD EXPRESSLY HOLD THAT THE NEW RULE WILL APPLY ONLY PROSPECTIVELY.

If this Court decides to depart from Schneckloth and either requires that the State prove that a defendant knew he had a right to refuse a request to search or imposes a Miranda-type warning requirement on state law enforcement, those requirements should be applied prospectively only and not retroactively. The Utah Supreme Court in Andrews v. Morris, 677 P.2d 81 (Utah 1983), adopted three factors to guide determinations of whether a new standard should be applied retroactively: 1) the purpose to be served by the new rule; 2) the extent of reliance on the old rule; and 3) the effect on the administration of justice of a retroactive application of the new rule. Andrews, 677 P.2d at 91 (citing Griffith v. Kentucky, 107 S. Ct. 708, 713 (1987)).

Applying these factors to the state constitutional analysis proposed by defendant indicates that neither the "knowledge standard" nor a Miranda-type warning should be applied retroactively.

A Miranda-type warning of the right to refuse consent would be prophylactic because the warning would not itself create any rights, but would merely serve to ensure that suspects are aware of their rights. Such a prophylactic purpose "does not favor retroactivity," Andrews, 677 P.2d at 93, because it does not implicate the basic fairness of a trial.[22] Similarly, requiring the State to prove that the defendant knew of his right to refuse consent does not fundamentally alter the right protected at trial. Consequently, because application of this new rule would serve as a guide for law enforcement in obtaining consent in future cases, but does not provide a new right for defendants at trial, this court should look to the remaining two factors which strongly militate in favor of prospective application only.

Both of the proposed new rules would represent a clear break from existing standards that could not have been anticipated by law enforcement. Law enforcement have long relied on decisions from Utah's courts that have held that knowledge of the right to refuse to consent is only one factor in determining

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[22] As noted by the Supreme Court, "[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the ascertainment of truth at a criminal trial." Schneckloth, 98 S.Ct. at 2055.

voluntariness. No other state has imposed a Miranda-type warning, and, as explained above, several have rejected such a requirement. Also, although New Jersey and Mississippi have opted to require proof of knowledge of the right to refuse consent, they are the only states that have done so. In short, the Court's Schneckloth standard has been the well established basis for determining validity of consent for many years, and law enforcement officials have relied on that standard. Consequently, the proposed "knowledge standard" and Miranda-type warnings would each mark a clear break from existing law. Generally, whenever such a clear break occurs, the Supreme Court "invariably has gone on to find such a newly minted principle nonretroactive." United States v. Johnson, 457 U.S. 537, 549, 102 S.Ct. 2579, 2587 (1982).[23]

Retroactive application of any new standard would have an adverse effect on the administration of justice in Utah. In Stovall v. Denno, the Supreme Court looked at the adverse effect that retroactive application of the Wade and Gilbert standards on identification evidence would have on the administration of justice and found that "[i]t is . . . very clear that retroactive application . . . 'would seriously disrupt the administration of our criminal laws.'" 388 U.S. 293, 300 (1966)(citation omitted).

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[23] See also Johnson, 346 A.2d at 68 (in adopting the rule that the state must prove suspects were aware of their right to refuse consent, the New Jersey Supreme Court also held that its "decision [was] to have prospective effect, applying only to searches based on consent which take place after the date of [this] opinion").

That is likewise true in this instance because retroactive application would require collateral inquiry into every consent search case in the state in order to determine if the defendant knew he could refuse the request to search. Opening the doors to collateral attack on every consent search in Utah would seriously impair the administration of justice in the state.

The State already bears the heavy burden of proving that a consent to search was voluntarily given. While the proposed standards do not fundamentally alter the rights of defendants at trial, both represent a clear break with past precedent and, if applied retroactively, would have an adverse effect on the administration of justice in Utah. Consequently, should this Court adopt either the "knowledge standard" of proof or a Miranda-type warning, it should expressly hold that they apply prospectively only.[24]

CONCLUSION

Deputy Barney lawfully stopped defendant's car based on his observation of fishtailing. When he subsequently smelled a common drug masking agent, the deputy reasonably asked if defendant was transporting narcotics. Deputy Barney's subsequent

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[24]If this Court decides to create such a rule, the question as to what the proper remedy for any violation of that new state constitutional rule can only be properly addressed after supplemental briefing by the parties. Likewise, if this Court creates a new rule, the proper remedy in this case would be a remand to the trial court to allow the State to attempt to demonstrate whether or not defendant did in fact know of his right to refuse consent.

warrantless search of defendant's car and trunk was proper based on defendant's voluntary consent.

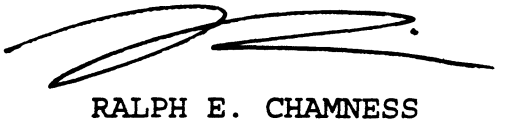
Defendant failed to demonstrate a subjective interest of privacy in the luggage. The trial court correctly concluded that this failure precluded defendant from complaining of any constitutional violation. This Court could also affirm the trial court's denial of the motion to suppress based on the fact that once defendant opened the trunk Deputy Barney smelled marijuana and had probable cause to search the luggage.

Because defendant failed to show that his search consent was preceded by any police illegality, the trial court properly declined to engage in an attenuation analysis below. It is similarly unnecessary for this Court to engage in an attenuation analysis on appeal.

Finally, defendant's claim under the state constitution fails to demonstrate any necessity to deviate from federal fourth amendment analysis. However, if this Court decides to impose this additional requirement on the State, that requirement should only be applied prospectively. Accordingly, this Court should uphold the trial court's denial of defendant's motion to suppress and affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 3rd day of November, 1993.

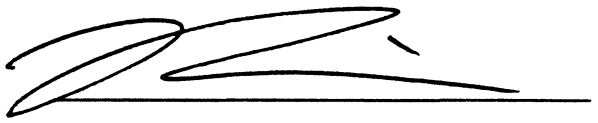
JAN GRAHAM
Attorney General



RALPH E. CHAMNESS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to D. GILBERT ATHAY, attorney for appellant, 72 East 400 South, Suite 325, Salt Lake City, Utah 84111, this 3rd day of November, 1993.



ADDENDA

ADDENDUM A

R. Don Brown #0464
Sevier County Attorney
Sevier County Courthouse
250 North Main Street
Richfield, Utah 84701
Telephone: (801) 896-6812

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

IN AND FOR SEVIER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. GREGORY MORRIS MATISON, aka GERALD MORRIS, aka MORRIS GREGORY MATISON, DOB: Defendant.	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 921600010FS Judge Don V. Tibbs

This matter came before the Court on July 14, 1992, on Defendant's Motion to Suppress. The Motion was argued by counsel for Defendant, Gil Athay, and R. Don Brown for the State. The parties have also submitted post-hearing memoranda. Having duly considered the evidence and arguments of the parties, including recent federal and Utah decisional law, the Court now makes and enters the following:

FINDINGS OF FACT

1. On January 14, 1992, Deputy Phil Barney was traveling to the Salina interchange of I-70 when he observed a vehicle which had just come off the eastbound lanes of I-70 at such exit.

2. Deputy Barney observed the vehicle "fish tail" as it came onto the access road from the freeway and then the vehicle stopped at a gas station/convenience store.

3. Deputy Barney drove up to the freeway underpass where the vehicle had been out of control to determine whether the action was the result of icy conditions and observed that the road was dry.

4. The officer observed that the driver of the vehicle was still stopped at the business establishment and commenced traffic enforcement activities on I-70 east of Salina.

5. Upon subsequently observing the vehicle traveling eastbound out of Salina and knowing that there are no services for 110 miles in such direction, Deputy Barney decided to stop the vehicle to determine whether the driver was impaired or why the driver was unable to control the vehicle at the Salina interchange.

6. The officer stopped the vehicle at 1:33 p.m. as shown on the video tape recording of the scene of the stop.

7. When the officer approached the Defendant's vehicle, the Defendant asked, "What am I being stopped for? Am I speeding?"

8. Deputy Barney responded by indicating that he would explain in a moment and asked for the license and registration to the vehicle.

9. At 1:34:14 p.m., Deputy Barney explained the reason for the stop and the Defendant stated that he had been having trouble with his cruise control and that was why he was unable to control the vehicle.

10. Deputy Barney had at this point smelled the odor of fresh ground coffee, an ingredient commonly used to mask the odor of raw marijuana, and noted the extreme nervousness of the Defendant who had offered an unreasonable explanation of his traveling in a vehicle for which he was not the owner.

11. Deputy Barney asked if the vehicle contained firearms or drugs and after receiving a negative response asked, "May I look in the vehicle?"

12. The Defendant consented at 1:34:35 p.m.

13. At 1:35:50 p.m., Deputy Barney asked the Defendant, "Would you pop the trunk," and the Defendant opened the trunk.

14. Upon observing the suitcases in the trunk and smelling the suitcase, Deputy Barney handcuffed the Defendant and arrested him at 1:36:38 p.m.

15. At 1:38:02, Deputy Barney opened one of the cases sufficiently to observe marijuana.

16. The vehicle was found to contain 138.25 pounds of marijuana.

CONCLUSIONS OF LAW

1. The Defendant submitted no evidence or testimony regarding his claim of interest in the substance seized or the contents of the vehicle and he lacks standing to challenge the search.

2. The initial traffic stop of the vehicle was pursuant to a legitimate law enforcement function.

3. The Defendant, upon being asked about the presence of firearms or drugs, voluntarily consented to open the vehicle for inspection.

4. The officer used no threats or coercion and the Defendant's actions were voluntary.

WHEREFORE, the Defendant's Motion to Suppress Evidence is denied.

SIGNED BY MY HAND this 11 day of September, 1992.

BY THE COURT:

DON V. TIBBS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a full, true and correct copy of the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully

thereon fully prepaid on the 14th day of September, 1992, addressed as follows:

Mr. D. Gilbert Athay
Attorney at Law
72 East Fourth South, Suite 325
Salt Lake City, Utah 84111

Mr. R. Don Brown
Sevier County Attorney
250 North Main Street
Richfield, Utah 84701

Anna S. Stone

ADDENDUM B

I. HISTORY OF SEARCH AND SEIZURE PROVISION IN UTAH CONSTITUTION.

The following history may be found at the Utah State Archives under the title "Constitution State of Deseret and Utah Constitutions, Memorials to Congress, and Proceedings of Convention 1849-1959," Microfilm Document No. 080979, C. Reel I (1849-1895), Utah State Archives No. 700-0000-1400:

1. Article VIII, Section 6 of the Constitution of the State of Deseret (1849):

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.

2. Article I, Section 18 of the Constitution of the State of Deseret (1872):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and not warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things, to be seized.

3. Article I, Section 16 of the Constitution of the State of Utah (1882):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and not warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things, to be seized.

4. Article I, Section 19 of the Constitution of the State of Utah (1887):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated, and not warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized.

5. Article I, Section 14 of the Constitution of the State of Utah (1895) (current provision):

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches shall not be violated; and not warrant shall

issue but on probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized.

II. FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ADDENDUM C

Alabama

Article I, Sec. 5

That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures or searches, and no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

Alaska

Article I, Sec. 14

The right of the people to be secure in their persons, houses, papers and other property against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Arizona

Article 2, Sec. 8

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Arkansas

Article 2, Sec. 15

The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

California

Article I, Sec. 13

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant may issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

Colorado

Article 2, Sec. 7

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

Connecticut

Article First, Sec. 7

> The people shall be secure in their persons, houses, papers, and effects from unreasonable searches and seizures; and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation.

Delaware

Article I, Sec. 6

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

Florida

Article I, Sec. 12

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under

decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Georgia

Article I, Sec. 13

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, except upon probable cause, supported by oath or affirmation, particularly describing the place, or places to be searched, and the persons or things to be seized.

Hawaii

Article I, Section 7

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and invasions of privacy shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized, or communications sought to be intercepted.

Idaho

Article I, Sec. 17

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

Illinois

Article I, Sec. 6

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Indiana

Article I, Sec. 6

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Iowa

Article I, Sec. 11

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Kansas

Bill of Rights, Sec. 15

> The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.

Kentucky

Bill of Rights, Sec. 10

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Louisiana

Article I, Sec. 5

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported

by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Maine

Article I, Section 5

The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause-supported by oath or affirmation.

Maryland

Declaration of Rights, Article 26

That all warrants without oath or affirmation, to search suspected places, or to seize any person or property, are grevious[grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

Massachusetts

Part I, Article 14

Every subject has a right to be secure from all unreasonable searches and seizures, or his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make searches in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Michigan

Constitution of 1963, Article I, Sec. 11

> The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Minnesota

Article I, Sec. 10

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Mississippi

Article III, Sec. 23

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

Missouri

Article I, Sec. 15

> That the people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

Montana

Article II, Sec. 11

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Nebraska

Article I, Sec. 7

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Nevada

Article I, Sec. 18

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or persons, and thing or things to be seized.

New Hampshire

Part First, Article 19

> Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.

New Jersey

Article I, Sec. 7

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

New Mexico

Article 2, Sec. 10

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

New York

Article I, Sec. 12

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

North Carolina

Article I, Sec. 20

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and

shall not be granted.

North Dakota

Article I, Sec. 14

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

Ohio

Article I, Sec. 14

> The right of the people to be secure in their person, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Oklahoma

Article 2, Sec. 30

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches or seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and describing as particularly as may be the place to be searched, and the person or thing to be seized.

Oregon

Article I, Sec. 9

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Pennsylvania

Article I, Sec. 8

> The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Rhode Island

Article I, Sec. 6

> The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

South Carolina

Article I, Sec. 10

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

South Dakota

Article VI, Sec. 11

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, and particularly describing the place to be searched, and the person or thing to be seized.

Tennessee

Article I, Sec. 7

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Texas

Article I, Sec. 9

> The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Utah

Article I, Sec. 14

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Vermont

Article I, Sec. 11

> That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Virginia

Article I, Sec. 10

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Washington

Article I, Sec. 7

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

West Virginia

Article III, Sec. 6

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

Wisconsin

Article I, Sec. 11

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Wyoming

Article I, Sec. 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, and particularly describing the place to be searched, and the person or thing to be seized.